IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-943

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROBERT L. GRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURN A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

BERNARD CAREY,
State's Attorney, Cook County, Illinois,
Room 500 - Richard J. Daley Center,
Chicago, Illinois 60602,
LEE T. HETTINGER,
JAMES S. VELDMAN,
Assistant State's Attorneys,
Of Counsel.

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CITATIONS

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Your petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the instant case on October 5, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois reversing the conviction of Robert L. Gray for the offense of aggravated battery was rendered by that court on October 5, 1977. It is not reported since, upon the motion of the People of the State of Illinois, the mandate of the court was stayed pending the outcome before this Honorable Court of the instant petition seeking the Writ of Certiorari. The opinion of the Illinois Supreme Court affirmed that of the Appellate Court of Illinois, First District, which was decided on February 27, 1976, and is reported at 36 Ill. App. 3d 720, 344 N.E. 2d 683. In accordance with Rule 19 of the Supreme Court of the United States each of these opinions appears in an appendix to the present petition.

JURISDICTION OF THIS COURT

The opinion of the Supreme Court of Illinois affirming the earlier determination of the Appellate Court of Illinois, First District, was filed on October 5, 1977. The jurisdiction of the Supreme Court of the United States to hear this case on writ of certiorari is invoked under 28 U. S. C. 1257(3), since in the proceedings in the courts of Illinois the defendant has specifically set up and asserted a right under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Whether the defendant who, during the pendency of his wife's action for divorce, entered the family home and first struck his wife with a gun and then shot her can be tried and convicted for aggravated battery based upon those actions, notwithstanding the fact that the judge in the divorce action has previously found defendant in contempt of court for these same actions which constituted a violation of a restraining order; or whether, as the defendant contends, such trial and conviction violate his right to be free from being twice placed in jeopardy for the same offense under the former jeopardy provision contained in Amendment V. of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V.;

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation".

STATEMENT OF THE CASE

A.

General Background.

On February 1, 1974, Robert L. Gray was indicted by the Grand Jury of Cook County, Illinois, on charges of aggravated battery and attempted murder growing out of his actions on October 15, 1973, in first striking his estranged wife with a gun and then shooting her. (R. C10-C12) At the time of the defendant's attack upon her, Mrs. Gray had filed suit for divorce against her husband. As part of this action the judge in the pending divorce case had issued a restraining order forbidding Robert Gray from striking, assaulting, or in any other way accosting or harming the person of his estranged wife. Following the attack upon Mrs. Gray, and upon her motion in the divorce court, contempt proceedings were instituted against Robert Gray. Following this, but preceeding the return of the indictment here in question, the judge in the divorce action entered an order finding Gray in contempt of court for his violation of the restraining order, and sentencing him to six months confinement in the Cook County Jail. (See Appendix D.) At the subsequent criminal trial, Robert Gray sought to plead in bar the former contempt finding under the concept of former jeopardy as embodied in the Fifth Amendment to the Constitution of the United States, and the corresponding provision of the Constitution of the State of Illinois, (Constitution of the State of Ilinois, Article 1, Section 10). (R. C21-C22) This motion was denied by the trial judge and the case proceeded to trail.

The evidence presented showed that on the night in question the defendant had entered the family home, threatened various persons therein, then struck his

estranged wife with a gun and then shot her. (R. 12-103) In his own testimony defendant admitted these actions. (R. 125-140) At the conclusion of the trial Robert Gray was found guilty of aggravated battery and sentenced to the Illinois State Penitentiary for a term of from one to three years.

Robert Gray sought review by the Appellate Court of Illinois, First District, which on February 27, 1976, reversed his conviction holding that the trial on criminal charges following the contempt finding constituted twice trying the defendant for the same offense. *People* v. *Gray*, 36 Ill. App. 3d 720, 344 N.E. 2d 683 (1976). The People sought timely leave to appeal to the Supreme Court of Illinois, which was allowed. By its opinion of October 5, 1977, that Court upheld the determination of the appellate court that Gray had been put twice in jeopardy for the same offense. (See Appendix A.) In the Supreme Court of Illinois a strong and, we submit, well-reasoned dissenting opinion was filed by Mr. Justice Howard C. Ryan. The People now seek review of the determination of the Supreme Court of Illinois by this Honorable Court by the Writ of Certiorari.

B.

Facts Material To The Question Presented.

Briefly stated, the facts germain to the determination of the question presented are as follows.

Defendant was found in indirect criminal contempt of court by the judge in his wife's pending action for divorce in that defendant willfully disobeyed an order by that judge restraining him from assaulting or harming his estranged wife. The defendant had entered the family home, threatened those persons there assembled (includ-

ing his wife's attorney), and then proceeded to beat and shoot his wife. Defendant was subsequently indicted and tried for aggravated battery growing out of the same striking and shooting. The defendant before trial moved for the dismissal of the indictment on the grounds that the former contempt finding barred criminal prosecution under the concept of former or double jeopardy, which motion was denied. Defendant was found guilty of aggravated battery.

Both the Appellate Court of Illinois, First District, and subsequently the Supreme Court of Illinois, have now held that in fact the contempt finding was a bar to the criminal prosecution and that defendant was improperly twice placed in jeopardy for the same offense, in violation of the United States Constitution, Amendment V., and the Constitution of the State of Illinois, Article 1, Section 10.

C.

Manner In Which The Federal Question Was Raised.

The federal question herein presented, that of the effect upon this case of the prohibition of Amendment V. of the United States Constitution against a defendant being twice placed in jeopardy for the same offense, was raised by defendant in the trial court prior to trial by his motion to dismiss the instant indictment. The argument relied upon by defendant throughout the Illinois State Appellate process has been that his right against being twice placed in jeopardy for the same offense was violated by the criminal trial for aggravated battery which herein concerns us. The conviction for that offense was reversed by the Appellate Court of Illinois, First District, and subsequently by the Supreme Court of Illinois, on that precise ground and that ground alone. Therefore, the federal question consti-

tutes the basis of all state court holdings and opinions below, and in particular that of the Supreme Court of Illinois review of which is sought by the present certiorari petition.

REASONS FOR GRANTING THE WRIT

I.

THE PROSECUTION OF ROBERT GRAY FOR AGGRAVATED BATTERY WAS NOT IMPROPER ON GROUNDS OF FORMER JEOPARDY BECAUSE OF A PREVIOUS CONTEMPT OF COURT FINDING ENTERED BY THE JUDGE IN DEFENDANT'S WIFE'S DIVORCE CASE SINCE THERE WAS NOT HERE PRESENT THE NECESSARY IDENTITY OF THE OFFENSES, AND SINCE THERE IS NO PROHIBITION AGAINST A DEFENDANT BEING PROSECUTED MORE THAN ONCE WHEN HIS ACTIONS CONSTITUTE MORE THAN ONE OFFENSE.

As we have noted, Robert Gray entered the home of his estranged wife, threatened the persons therein assembled, then first struck his wife with a gun and then shot her. On the basis of a prior restraining order by the judge in the divorce action, that judge found defendant in contempt of court. Subsequently, Gray was indicted for aggravated battery and attempted murder and, his attempt to plead the contempt finding in bar being unsuccessful in the trial court, he was tried and convicted of aggravated battery. Subsequently, first in the Appellate Court of Illinois, First District, and then in the Illinois Supreme Court, this later conviction was set aside as in violation of defendant's right to be free from being tried more than once for the same offense. The People of the State of Illinois now seek review by this Court on certiorari of the determination of

the Illinois Supreme Court, believing that the holdings of the Illinois courts in this case constitute a mis-interpretation of the former jeopardy provision embodied in the Fifth Amendment to the Constitution of the United States. We submit that an indirect criminal contempt of court and a state criminal charge based upon the same series of acts are not the *same offense* for former or double jeopardy purposes and that, therefore, the opinion of the Supreme Court of Illinois to the contrary should be set aside.

As was stated by Mr. Justice Ryan in his dissenting opinion in the Supreme Court of Illinois (see Appendix A):

> "I dissent from the majority opinion, which fails to recognize that criminal contempt by violation of a court order and aggravated battery are two separate offenses for double jeopardy purposes, each requiring distinct elements of proof, even though both offenses arise from the same course of conduct". (opinion p. 5, Appendix A. p. A. 7.)

We submit that in so stating Justice Ryan has correctly interpreted the former jeopardy provision of the United States Constitution and has properly applied it to this case. Therefore, the majority of the members of the Illinois Supreme Court should have adopted his view, and their determination to the contrary must be set aside on review.

That under our legal system one may not be twice placed in jeopardy for the same offense is abundently clear. Constitution of the United States, Amendment V.; Constitution of the State of Illinois, Article 1, Section 10; *United States* v. *Jorn*, 400 U.S. 470 (1971). The statutes of the State of Illinois further implement this policy in that they provide that a second prosecution for the same offense will not lie (Ill. Rev. Stat. (1975), Ch. 38, Section 3-4), and

that when offenses can and should be tried together they may not be tried separately unless the requiremets of justice to the accused mandate separate trials. Ill. Rev. Stat. (1975), Ch. 38, Sec. 3-3. The underlying reason for this rule is to prevent the state from making repeated attempts to convict an individual for the same offense, thus subjecting him to continued insecurity and even possible harrassment, and enhancing the possibility that, although innocent, he might be found guilty. *Green* v. *United States*, 355 U. S. 184 (1957). What is sought to be prevented can be seen from the *Green* decision of this Court and, for example, in *People* v. *Stickler*, 31 Ill. App. 3d 977, 334 N.E. 2d 475 (4th Dist., 1975). In that last cited case Strickler, notwithstanding the fact that he had plead guilty to the theft of certain rings, was indicted for the theft of those rings along with other items taken by him in the same transaction. Of course such double prosecution for the same offense could not be allowed to stand.

However, the prohibition against twice placing a person in jeopardy concerns itself with the *identity of the offenses* and not wih the identify of the act or series of acts out of which they arise. *Ciucci* v. *Illinois*, 355 U.S. 571 (1958). The Supreme Court of Illinois has on many occasions so held. *People* v. *Joyner*, 50 Ill. 2d 302, 278 N.E. 2d 756 (1972); *People* v. *Hairston*, 46 Ill. 2d 348, 263 N.E. 2d 840 (1970), certiorari denied, 402 U.S. 972 (1971). Thus there is nothing improper and nothing constitutionally repugnant in the defendant being prosecuted for more than one offense even through those offenses arise from the same act or series of acts on the part of the defendant. *Ciucci* v. *Illinois, Supra.; People* v. *Garman*, 411 Ill. 279, 103 N.E. 2d 635 (1952). As was noted by Mr. Chief Justice Burger in his dissenting opinion in *Ashe* v. *Swenson*, 397 U.S. 436, 463 (1969). "The concept of double jeopardy and our

firm constitutional commitment is against repeated trials for *the same offense*". In turn, the question of whether we are dealing with the same offense or with more than one offense arising out of the same act or series of acts, depends upon whether the proof necessary to establish one offense contains an element not necessary to the establishment of the other. *Waller* v. *Florida*, 397 U.S. 387 (1970); *Blockberger* v. *United States*, 284 U.S. 299 (1932). As noted by Justice Burger in *Ashe* v. *Swenson*, *supra*, when distinct elements are present, multiple prosecutions are proper. While recognizing this rule, the majority opinion of the Supreme Court of Illinois finds no distinction in the proof necessary to an indirect criminal contempt of court and that establishing the criminal offense of aggravated battery. Thus, the majority concludes, that the contempt and the aggravated battery are the same offense for double jeopardy purposes. In so holding, the Illinois Supreme Court is incorrect.

In order to prove aggravated battery in the instant case it was necessary that the prosecution prove that the defendant intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement to another, or that the defendant committed a battery with the use of a deadly weapon. Ill. Rev. Stat. (1975), Ch. 38, Section 12-4. In order to prove criminal contempt of court (in this instance contempt of court in the pending divorce action), it was necessary to prove the existence of and the contents of the original restaining order, and the willful violation of that order by Robert Gray. As to the first, the elements of the offense are set out by the above-cited statute. (See Appendix C.) As to the second, it is clear that the existence of an order and the willful violation of its provisions by the defendant-contemnor are essential

elements of proof on the charged contempt. *United States* v. *Greyhound Corporation*, (7th Cir., 1974), 508 F. 2d 529; *People* v. *Wilcox*, 5 Ill. 2d 222, 125 N.E. 2d 453 (1955). It must be obvious that the existence of the restraining order, its provisions, its willful violation by the defendant, and even the existence of the divorce action in which that order was entered, had nothing to do with the aggravated battery prosecution and the proofs appropriate and necessary to sustain a conviction therein. Thus, it follows that different elements of proof were necessary and that, therefore, the contempt of court and the aggravated battery were not the *same offense* for the purposes of the former jeopardy provision of the Fifth Amendment. Nor would they constitute the *same offense* for the purposes of the corresponding provision of the Constitution of the State of Illinois. Clearly, the defendant was not placed twice in jeopardy for the *same offense*.

While it is true that due to the consequences to the contemnor criminal contempt of court is a crime for the purposes of making necessary application of principles of due process of law (*Bloom* v. *Illinois*, 391 U.S. 194 (1968)), it would be nonsense to say that by this determination this Court meant to say that criminal contempt and a crime defined by the criminal statutes of a state are identical in all respects. This, however, is just what the Supreme Court of Illinois attempts to do in its majority opinion. So, that court cites *Waller* v. *Florida*, 397 U.S. 387 (1970), for the proposition that two courts of the same sovereignty cannot twice try the defendant for the same offense. However, in fact the question of whether one act constituted more than one offense and could therefore be the subject of multiple prosecutions was not reached by this Court in the *Waller* case. Rather, this Court, upon the narrow issue therein presented, decided the matter on the assumption

that the first violation of which defendant was convicted was a lesser included offense of the second charge later made against the defendant for the same act. Thus, the holding there was the same as that in the recent case of *Brown* v. *Ohio*, —— U.S. ——, 97 S. Ct. 2221 (1977); that is, that a lesser included offense is not a separate offense for which a separate prosecution would be proper under the concept of former jeopardy. In fact, as noted in *Waller*, a conviction of a lesser included offense operates as a *de facto* acquittal of the greater offense. Indeed, this seems a fairly straightforward result. But, contrary to the majority view of the Illinois Supreme Court, the concept above discussed has no relevance to the instant case.

As be have above noted, there is no prohibition against more than one prosecution based upon the same act if, in fact, that act results in the commission of more than one offense. *Abbate* v. *United States*, 359 U.S. 187 (1959). An indirect criminal contempt of court which, as is true here, was entered in a civil proceeding to which the People of the State of Illinois were not and could not be a proper party, is a separate and distinct offense from a violation of the criminal laws of the State of Illinois which must be prosecuted by the People. The Illinois courts have held that a contempt of court consists in a willful act of the contemnor directed against the dignity and authority of the court. *People Ex Rel. Kazubowski* v. *Ray*, 48 Ill. 2d 413, 272 N.E. 2d 225 (1971). The primary purpose in the punishment for a criminal contempt is to vindicate the authority and dignity of the judiciary *People* v. *Marcisz*, 32 Ill. App. 3d 467, 334 N.E. 2d 737 (3rd Dist., 1975). Concerning contempt of court based upon the willful violation of a court order, this Honorable Court has stated that a court order, even if erroneous, must in most instances be followed and that failure to follow it is conduct consti-

tuting contempt. *Manness* v. *Meyers*, 419 U.S. 449 (1975); *Howat* v. *Kansas*, 258 U.S. 181 (1922). To hold otherwise would be to openly invite conduct degrading to the dignity of the courts and the judiciary. Considering these principles, Mr. Justice Ryan concludes in his dissent (opinion P. 8, Appendix A. P. A. 12);

> ". . . It is my belief that contempt retains a distinctive function in specifically protecting our judicial system from abuse. I believe that the additional element of willful disobedience in this case is neither immaterial nor insubstantial in distinguishing criminal contempt from ordinary criminal offenses".

In fact, the United States Supreme Court has specifically found that it is not improper to punish twice the same act which constitutes both a willful contempt of the United States Senate and the laws of the District of Columbia. *In Re. Chapman*, 165 U.S. 661 (1897). It has been suggested that a contrary result was reached by this Court more recently in *Columbo* v. *New York*, 405 U.S. 9 (1972), but this is not correct. In *Columbo*, the majority of this Court remanded the cause without reaching this issue since it was manifest upon the record therein presented that the court below had completely misapprehended the nature of a criminal contempt. While certain decisions of intermediate federal courts have appeared to find to the contrary, we submit that the proper rule is that one act which constitutes both criminal contempt of court and a violation of a state's' criminal statutes results in the commission of separate and distinct offenses which may be properly tried and separately punished under the concept of double jeopardy. The contempt and the statutorially defined crime are simply not the *same offense* although they may result from one act or series of acts.

There are other aspects of the opinion of the Illinois Supreme Court which, if certiorari is granted, may be discussed in the brief to be filed by the People of the State of Illinois; such as the fact that the court sitting in the divorce action had no jurisdiction to try the criminal charge against Gray, further indicating the inapplicability of the concept of a single offense and of the former jeopardy prohibition. However, there is no need at this juncture to discuss all of these aspects of the case. Suffice it to say, on the basis of what has been said above, that it is clear that the interpretation by the Illinois Supreme Court of the Fifth Amendment prohibition against double jeopardy, as well as the cases interpreting that provision decided by this Court, is erroneous and should not be allowed to stand. Therefore, certiorari to review that court's decision in the present case should be granted.

II.

THE RULE ADOPTED BY THE SUPREME COURT OF ILLINOIS WOULD LEAVE TO A JUDGE IN A CIVIL OR CRIMINAL CASE THE DETERMINATION OF WHETHER A DEFENDANT SHOULD BE INDICTED FOR CRIME OR MERELY FOUND IN CONTEMPT OF COURT FOR A PARTICULAR ACTION, AND, WHEN THE JUDGE FELT THAT DEFENDANT SHOULD BE INDICTED, WOULD ROB HIM OF HIS INHERENT POWER TO PUNISH FOR WILLFUL DISOBEDIENCE OF HIS ORDERS.

One other serious objection to the decision herein reached by the Supreme Court of Illinois centers around its consequences. These must be considered at least briefly in this petition. As expressed in the dissenting opinion of Justice Ryan (Opinion, p. 5, Appendix A. P. A.-1), "The majority opinion also creates a potential conflict between

judge and prosecutor as to who will determine when an act will be prosecuted as a criminal violation, because, as discussed later, if a contempt conviction stands as a bar to criminal prosecution, a minor contempt penalty could potentially bar any prosecution for a serious criminal offense".

It is clear that a court must possess the inherent power to punish for contempt those individuals who willfully refuse to obey its orders. Thus, this Court has noted that even should an order be considered unlawful, the remedy is to appeal the order, not to disobey it, and such disobedience in most cases will be conduct constituting contempt of court. *Manness* v. *Meyers*, 419 U.S. 449 (1975); *Howat* v. *Kansas*, 258 U.S. 181 (1922). To hold otherwise would result not only in the flaunting of court orders and the chaos which this would lead to, but also would hold the courts up to public ridicule and scorn for this very powerlessness. Yet, the opinion of the Supreme Court of Illinois moves toward this very undesirable state of affairs in that it places the judge in a case such as this one in an untenable position. On the one hand, he may find the defendant in contempt of court, but to do so is to preclude criminal prosecution for the same action. On the other hand, if he feels that a serious criminal offense must be prosecuted, the judge must find himself powerless to punish the most blatant and shocking willful disobedience of his lawful orders. Then, there is the other side of this same coin. In the first instance under Illinois law, the decision whether to seek a criminal indictment rests in the hands of the State's Attorneys of the several counties within the State. Ill. Rev. Stat., Ch. 14, Sec. 5. Yet, notwithstanding this clear mandate from the Illinois State Legislature, the opinion of the Supreme Court of Illinois would permit a judge, by the imposition of a minor penalty for contempt of court,

to frustrate the prosecuting authorities in the performance of their statutory function. It is incredible that a rule of law which could allow a man who killed another human being to suffer only a fifty dollar fine for contempt of court could possibly be a correct or sensible rule. Yet, this is the rule espoused by the majority of the Illinois Supreme Court in this case. Such a rule cannot be allowed to stand.

On the contrary, it has been held that the interest of the federal authorities in prosecuting a criminal offense is a thing separate and apart from the interest of the judiciary in retaining the power to punish for contempt of court. *United States* v. *Rollerson* (D.D.C., 1970), 308 F. Supp. 1014, affirmed, 449 F. 2d 1000. In *United States* v. *Mirra* (S.D. N.Y., 1963), 220 F. Supp. 361, this thinking was carried another step. There, the defendant was summarily found in direct contempt of court for throwing a chair at one of the prosecuting attorneys. The court first noted that there was no question of improper former jeopardy in a later criminal prosecution since the summary contempt did not subject the defendant to a trial or hearing. However, the court went on to state that the consequences of finding otherwise were absurd and repugnant. The court noted that had the prosecutor died of the blow aimed at him, and had conditions been somewhat different, there existed the possibility that the defendant might have been granted effective immunity from a murder prosecution by the contempt finding. A similar thought was expressed by Justice Ryan in his dissent concerning what might have happened had Gray's bullet found a fatal point of entry into the body of his wife. To hold as does the Illinois Supreme Court here is to hold that had Mrs. Gray died, the defendant might have escaped all punishment save a small fine for contempt of court. While this is not likely, it is a possible consequence of the position taken by the Supreme Court of

Illinois, and illustrates the incorrectness of the interpretation by that court of the application to the Fifth Amendment prohibition against double jeopardy to the instant case.

In light of such possible consequences, the opinion of the Illinois Supreme Court sought to be reviewed here by Writ of Certiorari should be so reviewed, and having been reviewed, should be set aside by this Honorable Court.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

BERNARD CAREY,
State's Attorney, Cook County, Illinois,
Room 500 - Richard J. Daley Center,
Chicago, Illinois 60602,
LEE T. HETTINGER,
JAMES S. VELDMAN,
Assistant State's Attorneys,
Of Counsel.

APPENDICES

APPENDIX A

Docket No. 48424—Agenda 2—May 1977

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant, v. ROBERT L. GRAY, Appellee.

MR. JUSTICE DOOLEY delivered the opinion of the court:

Here the sole issue is whether the constitutional guarantees against double jeopardy prohibit criminal prosecution for aggravated battery and attempted murder after a finding and punishment for indirect criminal contempt of court based upon the same conduct.

Defendant, Robert Gray, struck his wife with a gun and then shot her. This violated a protective order in a divorce proceeding enjoining Gray from striking or molestin his wife.

The trial judge in the divorce case conducted a hearing on the wife's emergency petition that Gray be held in contempt of court for assaulting and shooting her. There was a finding of wilful contempt of court, and Gray was sentenced to six months in Cook County jail.

Subsequently, Gray was indicted for aggravated battery (Ill. Rev. Stat. 1973, ch. 38, par. 12-4) and the attempted murder (Ill. Rev. Sat. 1973, ch. 38, par. 8-4) of his wife based on the same conduct. His motion to dismiss on double jeopardy grounds was denied. He was convicted of aggravated battery and sentenced to 1 to 3 years.

On appeal, the Appellate Court, First District, found Gray had been placed twice in jeopardy for the same offense and reversed the criminal conviction. (36 Ill. App. 3d 720.) We granted the State's petition for leave to appeal under Rule 315 (58 Ill. 2d R. 315).

The pivotal question is whether Gray's offense of criminal contempt and his offense of aggravated battery constitute the same offense for purposes of the double jeopardy provision of the Illinois or the United States constitutions.

Both the fifth amendment to the United States Constitution and article I, section 10, of the Illinois Constitution of 1970 protect persons from being placed twice in jeopardy for the same offense. The fifth amendment to the Constitution of the United States provides:

> "*** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amend. V.)

Article I, section 10, of the Illinois Constitution states:

> "No person shall *** be twice put in jeopardy for the same offense." (Ill. Const. 1970, art. I, sec. 10.)

The fifth amendment, with or without any provision in the Illinois Constitution, is controlling. It applies to the States through the due process clause of the fourteenth amendment. *Benton* v. *Maryland* (1969), 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

The concept of double jeopardy has long been a part of the common law. Blackstone employed the term "jeopardy" in describing the underlying principle of the pleas of *autrefois acquit* (prior acquittal) and *autrefois convict* (prior conviction). This principle, he said, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. Blackstone, Commentaries *335.

Coke described the protection afforded by the principle of double jeopardy as a function of three related common

law pleas: *autrefois acquit* (prior acquittal), *autrefois convict* (prior conviction), and former pardon. 3 E. Coke, Institutes 212-13 (1797); J. Sigler, Double Jeopardy 2-16 (1969).

To determine whether two actions are prosecutions for the same offense, the test is: Would the same evidence sustain the proof of each offense? It is not necessary that a person be tried twice for the same action; so long as he has been put in jeopardy, the guarantee against subsequent jeopardy attaches. *Gavieres* v. *United States* (1911) 220 U.S. 338, 342, 55 L. Ed. 489, 490, 31 S. Ct. 421, 422.

Very recently in *Brown* v. *Ohio* (1977), —— U.S. ——, 53 L. Ed. 2d 187, 97 S. Ct. 2221, Mr. Justice Powell, speaking for the court in holding that prosecution and punishment for auto theft prohibited prosecution and punishment for joyriding, had occasion to restate the controlling principles which bar successive prosecutions as well as consecutive sentences at a single trial. He said:

> "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932):
>
> > 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. ***'
>
> This test emphasizes the elements of the two crimes. 'If each requires proof that the other does not, the *Blockburger* test would be satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. ***' *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

> If two offenses are the same under this test for purposes for barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." (—— U.S. ——, ——, 53 L.E. 2d 187, 194, 97 S. Ct. 2221, 2225).

So also if the two offenses differ so as to permit the imposition of consecutive sentences, nonetheless successive prosecutions are barred where the second requires the litigation of factual issues determined by the first. (*Ashe* v. *Swenson* (1970), 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189.) Since it is a part of that constitutional guarantee, "its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact ***." *Ashe* v. *Swenson* (1970), 397 U.S. 436, 442-43, 25 L. Ed. 2d 469, 475, 90 S. Ct. 1189, 1194.

The doctrine of collateral estoppel is embodied in the fifth amendment's guarantee against double jeopardy. As Holmes expressed it: "It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States* v. *Oppenheimer* (1916), 242 U.S. 85, 87, 61 L. Ed. 161, 164, 37 S. Ct. 68, 69.

The protections afforded by the constitutional guarantees are against a second prosecution after acquittal, a second prosecution after conviction, and multiple punishments for the same offense. *North Carolina* v. *Pearce* (1969), 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072.

The underlying considerations for these protections are expressed in *United States* v. *Wilson* (1975), 420 U.S. 332, 343, 43 L. Ed. 2d 232, 241, 95 S. Ct. 1013, 1021:

> "The interests underlying these three protections are quite similar. When a defendant has been once convicted and punished for a particular crime, prin-

> ciples of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. [Citations.] When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' "

To subject a person to multiple successive prosecutions because of differences in detail in proofs undermines the fundamental basis of the double jeopardy ban. Considerations of fairness and finality, the very foundation of the double jeopardy bar, require a nontechnical evaluation of the "same evidence" test, and a focus upon the similarity of the elements involved in the two proceedings. Thus the conviction of a lesser included offense barred prosecution for a greater offense, although proof of the greater offense required the establishment of an additional intent element. The greater offense was the same as the lesser offense, since the lesser offense required no proof beyond that required for the conviction of the greater offense. *Brown* v. *Ohio* (1977), —— U.S. ——, 53 L. Ed. 2d 187, 97 S. Ct. 2221.

Here an application of the same-evidence test makes manifest that defendant was prosecuted and punished twice for the same offense. He was tried and held in indirect criminal contempt of court as well as punished for striking and shooting his wife. Subsequently he was tried and convicted of aggravated battery and acquitted of the crime of attempted murder for the same conduct.

The purpose of criminal contempt is identical with that of many other criminal laws, namely, to protect the institutions of government. Certainly the impact on the particular defendant is the same. (*Bloom* v. *Illinois* (1968), 391 U.S. 194, 201, 20 L. Ed. 2d 522, 528, 88 S. Ct. 1477, 1482.) As Holmes stated: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States* (1914), 233 U.S. 604, 610, 58 L. Ed. 1115, 1120, 34 S. Ct. 693, 695.

Notwithstanding defendant's conviction and punishment for criminal contempt, he was tried and convicted a second time for the same conduct, striking and shooting his wife, in a criminal proceeding. The finding of criminal contempt and the conviction of aggravated battery constituted double trial and double punishment for the same offense.

The State urges there was no infringement upon defendant's guarantee against double jeopardy because the divorce court lacked jurisdiction to try offenses under the Criminal Code of 1961 (Ill. Rev. Stat. 1975, ch. 38, par. 1-1 *et seq.*). This argument is absent merit.

Two courts within one sovereign State may not place a person on trial for the same offense. (*Waller* v. *Florida* (1970), 397 U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184; *People* v. *Allison* (1970), 46 Ill. 2d 147.) Both the divorce court and the criminal court are courts of the same sovereign, the State of Illinois. Since the offenses of criminal contempt and aggravated battery were the same, a trial for the offense in both the divorce and criminal court violates the guarantees against double jeopardy.

The judgment of the appellate court reversing the second conviction for aggravated battery was correct. It is affirmed.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, specially concurring:

I concur in the court's judgment under the compulsion of *Waller* v. *Florida* (1970), 397, U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184.

In *Waller* the Supreme Court held that identical conduct could not be punished as a violation of a municipal ordinance and again as a violation of a State statute "since both are arms of the same sovereign." (397 U.S. 387, 393, 25 L. Ed. 435, 440, 90 S. Ct. 1184, 1188.) That holding, it seems to me, is conclusive on the facts of this case, for the contempt of court is an offense against the sovereign State of Illinois, acting through its judicial branch, and the aggravated battery and attempted murder charges represent direct violations of the same sovereign's criminal laws.

MR. JUSTICE RYAN, dissenting:

I dissent from the majority opinion, which fails to recognize that criminal contempt by violation of a court order and aggravated battery are two separate offenses for double jeopardy purposes, each requiring distinct elements of proof, even though both offenses arise from the same course of conduct. The majority opinion also creates a potential conflict between judge and prosecutor as to who will determine when an act will be prosecuted as a criminal violation, because, as discussed later, if a contempt conviction stands as a bar to criminal prosecution, a minor contempt penalty could potentially bar any prosecution for a serious criminal offense.

The applicable rule, as petitioner noted in his brief, was stated in *People* v. *Hairston* (1970), 46 Ill. 2d 348, 358:

> " 'For a double jeopardy claim to be viable, it must be shown that the two offenses charged are in law and in fact the same offenses.' (*Hattaway* v. *United States* (5th cir. 1968), 399 F. 2d 431, 432.) 'It is the identity of the offense, and not of the act, which is referred to in the constitutional guarantee against double jeopardy; ***.' (*People* v. *Ciucci*, 8 Ill. 2d 619, 629, aff'd 356 U.S. 571, 2 L. Ed. 2d 983, 78 S. Ct. 839.) Two or more distinct offenses may emanate from the same transaction or act, and we have consistently held that the rule that a person cannot be put twice in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. (*People* v. *Allen*, 368 Ill. 368, 379; *People* v. *Golson*, 32 Ill. 2d 398, 410-411.)"

As the majority notes, the test for determining whether two offenses are identical for double jeopardy purposes is the *Blockburger* test: "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (*Blockburger* v. *United States* (1932), 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 182.) Having noted this established rule of law, the majority recites the rationale for the double jeopardy prohibition, notes the similarity of purpose of criminal contempt and other criminal laws, and then states: "Notwithstanding defendant's conviction and punishment for criminal contempt, he was tried and convicted a second time for *the same conduct*, striking and shooting his wife, in a criminal proceeding." (Emphasis added.)

I agree with the statement that both prosecutions arose from the same course of *conduct* of defendant. In the next line, however, the majority concludes: "The finding of

criminal contempt and the conviction of aggravated battery constituted double trial and double punishment for the same *offense*." (Emphasis added.) In so concluding, the majority ignores the fact that they are not the same offense, that different elements must be proved for criminal contempt and aggravated battery under the facts of this case.

The criminal contempt in this case consisted of a violation of a protective order, enjoining defendant from "in any way interfering with the marital home," from "interfering with the freedom and well-being" of his wife and children or "in any way striking, hitting, choking, assaulting, molesting or in any way harming" his wife or children.

Generally, wilfullness is a necessary element of criminal contempt. (*United States* v. *Greyhound Corp.* (7th Cir. 1974), 508 F. 2d 529, 531.) In a contempt of the present kind, "the existence of an order of the court and proof of wilful disobedience are essential." (*People* v. *Wilcox* (1955), 5 Ill. 2d 222, 228.) Conceivably, the defendant could have been found guilty of contempt for shouting at his wife or children while on the marital premises, long before the shooting occurred. In fact, the contempt order found that defendant wilfully violated the injunction "in that he did * * * assault his wife with a gun and did then and there threaten the lives of his wife, children, attorney and others and did shoot his wife and beat her with a gun * * *."

On the other hand, in order to prove aggravated battery under the facts of this case, by statute, it is necessary to prove that the defendant, in committing a battery (a) intentionally or knowingly caused great bodily harm, permanent disability or disfigurement or (b) used a deadly weapon. Ill. Rev. Stat. 1973, ch. 38, pars. 12-4(a), (b).

Thus, significantly different elements are involved in the proof of each offense. While the majority simply states that the act is the same and thus the offense is identical, it fails to recognize exactly what must be proved to establish each offense. Aggravated battery does not require proof of a court order or wilful disobedience; it merely requires proof of an intentional bodily contact causing great bodily harm, or the use of a weapon. It should be noted that much of the conduct found in the court order to be contemptuous (assaulting his wife with a gun and threatening the lives of his wife, children and attorney) constitutes criminal contempt separate and apart from defendant's conduct which would be involved in the criminal charge.

In *Brown* v. *Ohio* (1977), ——U.S.——, 53 L. Ed. 2d 187, 97 S. Ct. 2221, relied on by the majority, the court held that an auto theft conviction barred a subsequent prosecution for joyriding, since joyriding was a lesser included offense of auto theft. The contempt in our case is not a lesser included offense. It is a separate and distinct offense to be prosecuted for separate purposes as noted later. The conduct for which the court found the defendant guilty constituted contempt whether or not he could be criminally punished for all or any part of such conduct.

In the appellate court opinion which the majority affirms, the court cited a Federal district court case, *United States* v. *United States Gypsum Co.* (D.D.C. 1975), 404 F. Supp. 619, which held that wilful disobedience of a court order is not such a material additional element so as to constitute criminal contempt a different offense from a criminal violation arising out of the same acts. In that case, the respondents had been enjoined from engaging in price-fixing activities, acts which constituted statutory violations in and of themselves under the Sherman Act. They

were indicted for conspiracy to commit price-fixing violations and found guilty after a four-month trial. Subsequently, a contempt petition was filed, based on the same acts, and the defendants pleaded double jeopardy. The court noted that the allegations of the criminal indictment were "virtually identical" to those of the contempt petition, the hearing would involve the "same evidence of the same conspiracy," the hearing would be a "replay" of the criminal trial requiring proof of the same facts by the same evidence, and the only additional element would be proof of a wilful violation of the court decree. (404 F. Supp. 619, 621-22.) The court then dismissed the contempt petition on grounds of double jeopardy.

The case is distinguishable from the case at bar. In *United States Gypsum,* the court order specifically prohibited a criminal act, price-fixing. Proof of a wilful violation of the order would have necessarily established a violation of the Sherman Act. The criminal trial was held prior to the contempt proceeding, and virtually all of the evidence and elements of proof would be the same. In the case at bar, however, the contempt conviction only held that the defendant had wilfully committed certain acts which violated the court order. The court order could have been violated by an otherwise legal act.

The significance of the criminal contempt element of wilful disobedience becomes more apparent when the respective purposes of contempt and ordinary criminal offenses are considered. The element of wilful disobedience is not a mere formal requirement, but is directly related to the stated purpose of criminal contempt proceedings – protecting the dignity of the judiciary: "Criminal contempt is conduct which is directed against the dignity and authority of the court or a judge acting judicially * * *." (*People ex rel. Kazubowski* v. *Ray* (1971), 48 Ill. 2d 413,

416.) "Criminal contempt consists of acts tending to lessen the dignity or impede the process of the court, and such proceedings are instituted to vindicate the authority of the court." (*People* v. *Marcisz* (1975), 32 Ill. App. 3d 467, 470.) While it has been suggested that the role of both criminal contempt and ordinary criminal offenses is to protect the institutions of government and the enforcement of their mandates (see *Bloom* v. *Illinois* (1968), 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477), it is my belief that contempt retains its distinctive function in specifically protecting our judicial system from abuse. Thus, I believe that the additional element of wilful disobedience in this case is neither immaterial nor insubstantial in distinguishing criminal contempt from ordinary offenses.

Two Federal cases, cited by the People at the appellate level, while factually distinguishable from the case at bar, do lend support to the proposition that the same conduct will support convictions for both criminal contempt and ordinary offenses. In *United States* v. *Rollerson* (D.D.C. 1970), 308 F. Supp. 1014, *aff'd* (1971), 449 F. 2d 1000, a defendant in a criminal trial was summarily found guilty of contempt for throwing a water pitcher at the prosecutor. He was later charged with assault on a Federal officer. The court held that there was no double jeopardy, noting that since the contempt was punished summarily, the defendant was not subjected to multiple proceedings. The court did note that dual governmental interests also supported the two charges stemming from the same conduct:

> "The separate interests of the Federal Court in itself protecting the dignity of the Court, and of the Federal prosecuting authority in initiating action to protect persons and property, recognized in *Mirra* [*United States* v. *Mirra* (S.D. N.Y. 1963), 220 F. Supp. 361], have consistently been recognized by the Courts.

> That separate interests in different governmental elements will support convictions under separate statutes making criminal the same acts which injure both interests was fully recognized by Justice Brennan in *Abbate* v. *United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959)." (308 F. Supp. 1014, 1018.)

The necessity of criminal contempt as a tool for deterring abuse of the judiciary demands that a judge not be required to consider the consequences of foreclosing subsequent criminal prosecutions. As the People note in their brief, the majority holding, in effect, gives the trial judge the power to decide whether a contumacious party will be charged with a criminal offense, thus usurping the function of the State's Attorney. It might also be noted that in most cases of a violation of a court order, the criminal contempt is really initiated or prosecuted by the aggrieved party; the contempt is not prosecuted in the name of the People, and the State's Attorney is not even notified or aware of the proceedings.

United States v. *Mirra* (S.D. N.Y. 1963), 220 F. Supp. 361, also cited by the People at the appellate level, indicates yet another danger. In that case, a defendant was summarily found in contempt for throwing a chair at the prosecutor during trial. On a subsequent prosecution for assault on a Federal officer, he pleaded the contempt conviction as a bar under double jeopardy. The court, while characterizing criminal contempt as *sui generis* (a label of questionable validity at present in light of *Bloom* v. *Illinois*), held that there was no double jeopardy since defendant did not have to defend in multiple proceedings. The court did note that an anomalous result might follow if contempt proceedings were held to be a bar to subsequent criminal prosecutions:

> "Let us consider by way of illustration the consequences of upholding Mirra's claim in the context of an extreme but not wholly improbable case that could

> have arisen after, and out of, Mirra's contempt conviction. Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target – the Assistant United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal. To sustain Mirra's claim would, in effect, grant a summary contemnor immunity from a homicide prosecution – an unconscionable result. Merely to state the case suffices to reveal what must perforce be the answer to Mirra's theory." (220 F. Supp. 361, 366.)

Similarly, in the present case, it is conceivable, though unlikely, that the defendant could have been fined $50 for his contumacious conduct. If his wife later died as a result of the shooting, we would have the undesirable dilemma where a murder prosecution is barred because of a $50 fine.

The People also analogize to the case of *People* v. *Bressette* (1970), 124 Ill. App. 2d 469, as a guideline for deciding the case at bar. In that case, the defendant was charged with reckless homicide for his acts which caused an auto accident. He argued that the prosecution was barred by the Criminal Code of 1961 (Ill. Rev. Stat. 1967, ch. 38, pars. 3-3, 3-4(b)), since he had pleaded guilty to a charge of improper change of traffic lane, an offense arising from the same conduct as that alleged in the reckless homicide charge. The appellate court held that the subsequent prosecution was not barred, since the prosecutor did not know of the previous conviction. While the present case was not decided under this statute, *Bressette*

points out the undesirable result which may follow from the majority opinion: a State's Attorney may be barred from prosecuting a criminal offense, simply because the underlying conduct was previously punished by a contemot penalty of which he was unaware.

I would accordingly reverse the appellate court and affirm the trial court's denial of the defendant's motion to dismiss.

APPENDIX B

No. 61486

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* vs. ROBERT L. GRAY, *Defendant-Appellant.*	Appeal from the Circuit Court of Cook County — Honorable James M. Bailey, Presiding

Mr. JUSTICE SULLIVAN delivered the opinion of the court:

Defendant brings this appeal from a judgment in a bench trial finding him guilty of aggravated battery and sentencing him to a term of from one to three years. His only contention on appeal is that he was twice placed in jeopardy for the same offense.

In a prior divorce action, the court had issued a protective order enjoining defendant from striking, molesting and/or hitting his wife. He subsequently struck her with a gun and then shot her. An emergency petition was brought on behalf of his wife, asking that he be held in contempt of court. It appears that a hearing was held on this petition in which defendant was found to have been in wilful contempt and was sentenced to serve six months in the Cook County jail. In his contempt order, the trial judge first noted that defendant had been taken into custody and charged with the attempt murder of his wife, and then the order stated:

> "Both parties and their attorneys being in open court and the court having heard testimony of the litigants and witness and being fully advised in the premises

> finds that the court has jurisdiction of the parties and the subject matter hereto and further finds that the defendant is in willful contempt of this court for assaulting and shooting the plaintiff * * *."

Thereafter, he was indicted for aggravated battery and the attempt murder of his wife. His motion to dismiss on double jeopardy grounds was subsequently denied.

The sole issue presented for review concerns whether double jeopardy prohibits a criminal prosecution for acts that have previously been punished as an indirect criminal contempt.

OPINION

Contempt can be either civil or criminal. (*People* v. *Gholson*, 412 Ill. 294, 106 N.E. 2d 333.) A civil contempt is coercive in nature, designed to benefit a party to the litigation. (*Cook County* v. *Lloyd A. Fry Roofing Co.*, 13 Ill. App. 3d 244, 300 N.E. 2d 830, rev'd on other grounds, 59 Ill. 2d 131, 319 N.E. 2d 472.) The contemnor is said to hold the keys to his own cell in that he may purge himself of the contempt by obeying the court order. (*Sullivan* v. *Sullivan*, 16 Ill. App. 3d 549, 306 N.E. 2d 604.) A criminal contempt, on the other hand, is punitive and the interest served is the protection of the judicial process. (*Kay* v. *Kay*, 22 Ill. App. 3d 530, 318 N.E. 2d 9.) The contemnor is sentenced to a definite term and is unable to avoid the punishment by complying with the court order. (*Lloyd A. Fry Roofing Co., supra.*) A criminal contempt may be direct if it is committed within the presence of the court, or indirect if proof of extrinsic facts are necessary to prove the contempt. (*McAdams* v. *Smith*, 25 Ill. App. 2d 237, 166 N.E. 2d 446.) A direct contempt may be punished summarily (*United States* v. *Rollerson* (D.D.C. 1970), 308

F. Supp. 1014, aff'd, 449 F. 2d 1000); whereas, an indirect contempt proceeding must satisfy due process safeguards (*People* v. *Javaras*, 51 Ill. 2d 296, 281 N.E. 2d 670).

In the instant case, the parties are in agreement that defendant was initially punished for an indirect criminal contempt. We are in accord with this view, because defendant was sentenced to a fixed term which he could not have avoided by compliance with any court order and because the acts occurred out of the court's presence. (See *Lloyd A. Fry Roofing Co., supra*; *McAdams, supra.*) We are thus left with the determination of whether his subsequent conviction of aggravated battery constituted double jeopardy.

Prohibitions against a defendant being twice placed in jeopardy for the same offense are contained in the constitutions of both the United States and Illinois. (U.S. Const. amnd. V; Ill. Const. 1970 art. I, sec. 10.) The federal prohibition has been held to apply to the states through the due process clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707.

Double jeopardy would have no application in this case if we were to accept the State's position in its brief that contempt proceedings here were civil in nature, because it is a settled rule that as the double jeopardy prohibition applies only to criminal proceedings, a criminal prosecution would not be barred by a prior civil action.[1] (22 C.J.S. Criminal Law sec. 240; *cf. People* v. *Kapande*, 23 Ill. 2d 230, 177 N.E. 2d 825.) However, the United States Supreme Court in *Bloom* v. *Illinois*, 391 U.S. 194, 201, 88 S. Ct. 1477, 20 L. Ed. 2d 522, has clearly held that criminal contempt is a criminal offense.

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1. In oral argument, the State agreed that defendant was punished for an indirect criminal contempt.

> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by a fine or imprisonment or both. In the words of Mr. Justice Holmes:
>
> > 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' *Gompers* v. *United States*, 233 U.S. 604, 610 (1914).
>
> Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case, convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical – protection of the institutions of our government and enforcement of their mandates."

Having recognized that criminal contempt is a criminal offense, we are left only with the determination of whether the "same" offense was twice punished in the instant case.

For double jeopardy purposes, the test of whether the same offense is involved in both prosecutions is whether either trial would involve any significant elements of proof absent from the other trial. (*Blockburger* v. *U. S.*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306.) There are two essential elements in all criminal offenses – (1) a voluntary act (Ill. Rev. Stat. 1973, ch. 38, par. 4-1); and (2) a mental state (Ill. Rev. Stat. 1973, ch. 38, par. 4-3). In the instant case, it is conceded by the State that the physical acts of shooting and striking with a gun supported the element of a voluntary act in both the contempt finding and the subsequent criminal conviction. Consequently, the only remaining issue is whether proof of a substantially different mental element was required in both proceedings.

This precise double jeopardy question has been recently litigated in the federal courts in *United States* v. *U. S. Gypsum* (D. Colo. Dec. 10, 1975), 44 U.S.L.W. 2291, where the court held that double jeopardy barred a contempt petition for price fixing because of a previous indictment for the same conduct. The court, in holding that no proof of a substantially different mental element was required in either proceeding, stated as follows:

> "Since the contempt proceeding contains only one element, i.e., wilful intent, which was not present in the (criminal) proceeding, (the) two offenses are the same for double jeopardy purposes within the meaning of the Blockburger test."

The court further held that:

> "[T]he addition of the element of a wilful violation of a court decree * * * is not * * * sufficiently material or substantial to supersede the considerations of fairness and finality which form the basis of the double jeopardy bar."

We are also in accord with the view expressed in *Gypsum* rejecting "the double jeopardy analysis which focuses on technical comparison of the elements of the two statutes rather than on the overwhelming similarities in the proof * * *." The record in the instant case reflects that the proofs adduced against defendant in both proceedings were overwhelmingly similar.

The State asserts, however, that defendant could not have been subjected to double jeopardy because the judge who found defendant guilty of contempt "was sitting only in the divorce action * * * (and) * * * had no jurisdiction over the (charge of aggravated battery)." This asserted lack of jurisdiction overlooks the fact that all circuit courts are courts of general jurisdiction. (Ill. Const. 1970, art. VI, sec. 9.) The judge of the circuit court who

held defendant in criminal contempt was equal in authority to those judges who try felony criminal cases and could have presided at a criminal trial for the same occurrence. While it is true that the contempt proceedings could not have resulted in a judgment that defendant was guilty of aggravated battery, the fact remains that he was twice punished for the same offense under the *Blockburger* test, because the elements of proof were substantially identical in both prosecutions. We do not believe that a mere disparity in punishments available for the two offenses restricts the application of the double jeopardy bar. See, *e.g.*, *Waller* v. *Florida*, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435.

From our analysis of the applicable law, we are satisfied that the Fifth Amendment prohibition against double jeopardy is violated when conduct previously punished as an indirect criminal contempt is again sought to be punished as a substantive criminal offense.

Before finally passing on this cause, it is necessary to discuss the prior decisions which have permitted punishment of acts both as criminal contempts and as separate criminal offenses.

The federal cases which have permitted the dual sanctions (*O'Malley* v. *United States* (8th Cir. 1942), 128 F. 2d 676; *United States* v. *Rollerson, supra*; *United States* v. *Mirra* (S.D. N.Y. 1963), 220 F. Supp. 361) are easily distinguishable from the instant case. *O'Malley* involved a misrepresentation in open court, while both *Mirra* and *Rollerson* concerned assaults by the contemnor on an officer of the court, committed in open court. In each of these cases, the contemnors were summarily punished, which distinguishes them from the instant case. The power of a court to punish for summary contempt was seen in *Roller-*

son as crucial to a determination of the double jeopardy issue. That court cited *Abbate* v. *United States*, 359 U.S. 187, 199, 79 S. Ct. 666, 673, 3 L. Ed. 2d 729, for the proposition that the essential element of the double prohibition was that "a person shall not be harassed by successive trials." No possibility of such successive trials could result from summary contempt proceedings, and the court reasoned:

> "[S]ince an adversary type proceeding does not precede the swift imposition of a summary contempt conviction, a criminal prosecution on a charge arising out of the contumacious conduct is the first trial type harassment to which the contemnor is made subject." (308 F. Supp. at 1018.)

In *United States* v. *Mirra, supra,* another case involving a summary contempt, it was emphasized that:

> "It is important to note the distinction between the totally different procedure that is involved in the punishment of criminal contempt committed in the court's presence as against a criminal contempt committed against an order or decree of the court." (220 F. Supp. at 364, n. 8.)

Thus, the federal cases which have permitted dual punishment by summary contempt and criminal prosecution of the same acts are clearly distinguishable from the instant indirect contempt proceeding where defendant was forced to "marshal the resources and energies necessary to his defense more than once for the same alleged criminal acts." *Abbate,* 359 U.S. at 198-99.

Our research reveals only one Illinois case addressing the contempt-double jeopardy issue. In *People ex rel. Scott* v. *Barbers & Beauty Culturists Assn.,* 9 Ill. App. 3d 981, 293 N.E. 2d 393, defendants were held in indirect criminal contempt of court for violating a restraining order pro-

hibiting them from controlling prices of barber services despite the fact that they had previously been acquitted of criminal charges of assault and intimidation arising from the same incident on which the contempt citation was based. The instant case is perhaps distinguishable in that the court in *Barbers* found that "widely distinct elements were involved in the two proceedings" (9 Ill. App. 3d at 984) without elaborating on what those elements were; whereas, we have determined that substantially the same elements of proof were required in both prosecutions in the instant case. In any event, the rationale of the *Barbers* holding that double jeopardy was not violated was based on the premise that "contempt is not a crime." (9 Ill. App. 3d at 984.) However, as pointed out in *Bloom, supra,* contempt *is* a crime.

Based on our holding that the double jeopardy bar of the Illinois and United States constitutions is violated by a subsequent trial for conduct that had previously been punished as an indirect criminal contempt, the conviction of defendant for aggravated battery is reversed.

Reversed.

LORENZ, P. J. and BARRETT, J. concur.

APPENDIX C

Constitution of the State of Illinois, Article I, Sec. 10:

> "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense."

Ill. Rev. Stat., Ch. 14, Section 5:

> "The duty of each State's Attorney shall be:
>
> (1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the Circuit Court of his county, in which the people of the state or county may be concerned."

Ill. Rev. Stat., Ch. 38, Sec. 3-3:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be presented in a single prosecution, except as provided in subsection (c), if they are based on the same act.
>
> (c) Where two or more offenses are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately."

Ill. Rev. Stat., Ch. 38, Sec. 3-4:

> "(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after a jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness has been sworn but before findings were rendered by the trier of the facts, or after a plea of guilty was accepted by the court.

A conviction of an included offense is an acquittal of the offense charged.

(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense for which the defendant should have been charged on the former prosecution, as provided by Section 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; or

(2) Was terminated by final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly under the circumstances stated in Subsection (a), and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly."

Ill. Rev. Stat., Ch. 38, Sec. 3-4(d):

"However, a prosecution is not barred within the meaning of this Section 3-4, if the former prosecution;

(1) Was before a court which lacked jurisdiction over the defendant or the offense. . . ."

Ill. Rev. Stat., Ch. 28, Section 12-4:

"(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement, commits aggravated battery.

(b) A person who in committing a battery either:

(1) Uses a deadly weapon . . . commits aggravated battery."

APPENDIX D

November 21, 1973

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department Divorce

Mary Ann Gray,

Plaintiff,

vs.

Robert L. Gray,

Defendant.

No. 73 D 19961

ORDER

This matter coming on to be heard on petition of the attorney for the plaintiff to have the plaintiff sentenced to the County Jail for violation of the injunction entered October 9, 1973, the defendant having been taken into custody for the attempted murder of the plaintiff and being so charged by the State of Illinois on that charge in lieu of $100,000.00 bail, and also on order of this Court continued at the request of the defendant to this date. Both parties and their attorneys being in open court and the court having heard testimony of the litigants and witness and being fully advised in the premises finds that the court has jurisdiction of the parties and the subject matter hereto and further finds that the defendant is in willful contempt of this court for assaulting and shooting the plaintiff on October 15, 1973.

It is ordered that the defendant shall be forthwith confined in the common jail of Cook County for a period of 6 months. The time he has served from October 16, 1973 to date shall be credited against said 6 months.

It is further ordered that the defendant is hereby enjoined from entering the marital home located at 4477 Gettysberg, Rolling Meadows, Illinois and the plaintiff shall have exclusive possession of said home.

Dated:

Enter:
/s/ H. R. Friedlund

Name: William Bruce Richards
Address: 1 North LaSalle Street
City: Chicago, Illinois
Telephone: CE 6-1085